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No. 85-1449

In the Supreme Court of the United States

OCTOBER TERM, 1985

TOWN OF NEWTON, ET AL.,
PETITIONERS,

v.

BERNARD E. RUMERY, JR.,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether a covenant not to sue public officials for violations of constitutional rights, extracted under the threat of criminal indictment and prosecution, and obtained for dismissal of criminal charges, is void *ab initio* as against public policy.

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Opinions Below

The opinions below are adequately set forth in the Petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Constitutional and Statutory Provisions

The constitutional and statutory provisions are adequately set forth in the Petition.

Counter-Statement of the Case

Factual Setting

Mr. Rumery is a middle-aged insurance representative who has lived in Newton, New Hampshire, a small New England village, all his life. Rumery is a family man with no prior arrests or criminal record. In Spring, 1983, after reading in a local newspaper that David Champney, an acquaintance of Rumery's, had been charged with felonious sexual assault, Rumery telephoned Mary Deary, a business and social acquaintance of Rumery, to inquire whether she knew about the incident. Rumery learned during that telephone conversation that Deary was the victim of the assault by Champney. Rumery and Deary had no further communications until May 11, 1983, when Deary telephoned Rumery. Deary initiated the telephone conversation with social conversation, but then expressed to Rumery her reluctance to go forward with the criminal charge against Champney because she was confused and distraught about the incident. The text of the telephone conversation was as follows:

> Deary: "I don't know what to do. I don't want to hurt him. I don't know what to do."
>
> Rumery: "Well if you feel that way towards him then you can—it's possible to, to end this case. It's possible to stop the case."
>
> Deary: "Well I was told I couldn't."
>
> Rumery: "Well you can call the County Attorney if you want and talk to them about i "
>
> Deary: "I'm not a bad person. I'm not vindictive."
>
> Rumery: "Well that's up to you. That's all I can say. Look Mary, I have to leave. I have an appointment. If you want to call me I'll be in the office at 11 o'clock tomorrow morning."

On the very next day, Rumery was arrested by Newton Police Chief Barrett and charged with a Class B Felony of tampering with a witness. (N.H. R.S.A. 641:5). Rumery, who had never even received a motor vehicle violation, was arrested at his home in front of his wife, handcuffed and transported to the County Jail.

Prior to making the arrest of Rumery, Chief Barrett chose not to request authorization for a wiretap; nor did he attempt to obtain a sworn affidavit from Deary; nor did he attempt to obtain any other corroborating evidence whatsoever. Rockingham County Deputy Prosecutor Brian Graf was "surprised" about the arrest of Rumery and concerned about the lack of independent corroborating evidence of the alleged witness-tampering charge.

Rumery retained Stephen Woods as counsel to defend him on the felony charge, and was scheduled to be indicted by the Rockingham Grand Jury on June 13, 1983. A probable cause hearing was also scheduled for Plaistow District Court on June 14, 1983.

Having had no prior exposure to the criminal justice system, and being innocent of the charge, Rumery was in an extremely excitable and emotional state of mind throughout the ordeal and was visibly distraught.

Attorney Woods and Prosecutor Graf discussed the possibility that the criminal prosecution of Rumery could be *nolle prossed* if Rumery agreed to sign a covenant not to sue the persons connected with his arrest. Prosecutor Graf indicated that if Rumery did not sign a covenant not to sue, the criminal process would continue, which included grand jury indictment and a probable cause hearing.

When presented with the covenant not to sue, Rumery was adamant against signing the covenant. Since Attorney Woods' goal was to clear Rumery of the criminal charge in one way or another, however, Woods recommended signing the covenant. Woods testified later that he had little, if any, concern about a potential civil suit by Rumery against public officials

and did not discuss with Rumery any details or specifics about the nature or type of civil rights and remedies Rumery possessed against public officials as a result of his arrest.

Rumery was told that if he did not sign the covenant not to sue, the felony charges would continue and that he would be indicted, in all likelihood, by the grand jury and face a probable cause hearing.

Under the threat of indictment and continued criminal prosecution, Rumery signed the covenant not to sue the public officials connected with his arrest on June 6, 1983. Thereafter, the criminal charges were *nolle prossed* by the prosecution.

Jurisdictional Setting

Rumery filed a Complaint in the United States District Court for the District of New Hampshire alleging deprivations of federal rights pursuant to 42 U.S.C. § 1983 and the 14th Amendment to the United States Constitution, as well as pendent state law claims of negligence, defamation, false imprisonment, negligent infliction of mental distress and state constitutional violations arising from his arrest for witness tampering. A Motion to Amend the Complaint was also filed alleging that Prosecutor Graf was acting as agent for defendants in his role to obtain the forfeiture of Rumery's significant federal and state rights by way of the covenant not to sue. Petitioners Town of Newton, Chief Barrett and the Selectmen pleaded the covenant not to sue as an affirmative defense and filed a Motion to Dismiss and/or Petition for Declaratory Judgment. Respondent objected on the grounds that the covenant not to sue was void *ab initio* as contrary to public policy; and in the alternative, that Respondent was entitled to a jury determination on the covenant, rather than an evidentiary hearing before the District Court Judge. The District Court Judge dismissed the Complaint on the grounds that the covenant not to sue was valid. Judgment was entered on April 30,

1985. Respondent filed an appeal with the Court of Appeals for the First Circuit in a timely fashion which reversed and remanded the District Court opinion on the grounds that the covenant not to sue was void as against public policy. The Circuit decision below was rendered on December 2, 1985, and Petitioners filed their Petition for a Writ of Certiorari with this Court.

Argument

I. There Is No Conflict Among the Circuits.

Petitioners claim that the First Circuit decision below is in conflict with opinions from the Fourth and Ninth Circuits: such is not the case. The three Circuit opinions, when properly understood, are not in conflict at all. *Bushnell* v. *Rossetti*, 750 F.2d 298 (4th Cir. 1984) and *Jones* v. *Taber*, 648 F.2d 1201 (9th Cir. 1981), are not in conflict with *Rumery* v. *Town of Newton*, 778 F.2d 66 (1st Cir. 1985) because *Bushnell* and *Jones* dealt with distinctly different legal and factual issues from the case at bar. *Bushnell* and *Jones* concerned releases which were executed *after* criminal convictions were obtained; whereas, the case at bar concerns a release extracted *before* criminal adjudication while criminal charges were still pending. Judge Timbers, writing the unanimous decision below, clearly distinguished between "pre-conviction" and "post-conviction" release/dismissal practices. *Rumery* v. *Town of Newton*, 788 F.2d 66, 69 (1st Cir. 1985).

In *Bushnell* v. *Rossetti*, 750 F.2d 298 (4th Cir. 1984), the Fourth Circuit specifically limited its opinion to release/dismissal arrangements negotiated after a determination of guilt but before sentencing. *Bushnell*, 750 F.2d at 301 fn. The Fourth Circuit stated that it had "no quarrel" with the holdings in those cases dealing with "pre-conviction" release/dismissal arrangements because of the "different contexts presented in those cases". *id.* at 301.

In *Jones* v. *Taber*, 648 F.2d 1201 (9th Cir. 1981), the Court also was presented with a release/dismissal arrangement negotiated after conviction and while awaiting sentence. *Id.* at 1202. The Ninth Circuit distinguished the Seventh Circuit decision of *Boyd* v. *Adams*, 513 F.2d 83 (7th Cir. 1975) which dealt with a "pre-conviction" release/dismissal arrangement. The *Jones* court noted that the *Boyd* decision did not say "*when*" a release might be valid. *Jones*, 648 F.2d at 1203 (emphasis added). "When" a release *might* be valid according to *Jones*, is limited to "post-conviction" arrangements while awaiting sentence. *Jones* at 1205-06.

Thus, *Bushnell* and *Jones* present very different legal and factual issues from those issues presented in the First Circuit decision below.

Legitimate and compelling reasons for applying different standards of review to "post-conviction" and "pre-conviction" releases are that in the post-conviction situation:

1. "The potential for prosecutorial abuse, exacting releases of related civil rights claims or retaliating for civil prosecution of such cases by threatening a claimant with charges, [does] not exist in the post-conviction setting. . . ." *Rumery* v. *Town of Newton*, 778 F.2d 66, 69 (1st Cir. 1985), *citing Bushnell*, 750 F.2d at 301;
2. "[T]he police practices that [would be] the subject of [a]§ 1983 claim [would have been] already 'exposed to full public inquiry when the dismissal agreement was executed.' " *Rumery*, 778 F.2d at 69, *quoting and citing Bushnell*, 750 F.2d at 301; and
3. "A determination of guilt after a completed criminal adjudication necessarily involves inquiry into and rejection of a claimant's defense based on the very police conduct challenged under a § 1983 claim." *Bushnell*, 750 F.2d at 301.

Whereas, in the "pre-conviction" situation, the potential for police and prosecutorial abuse is just "to injurious to the public interest to be sanctioned". *Rumery*, 778 F.2d at 70.

Petitioners' claim of conflict of opinion among the Circuits on the same matter as presented in the case at bar is illusory and does not merit this Court's grant of certiorari.

II. There Is Uniformity Among the Circuit Decisions on the Same Matter.

The decision below is fully in accord with the only two Circuit decisions in which the same legal and factual issues have been squarely presented. In *Boyd* v. *Adams*, 513 F.2d 83 (7th Cir. 1975), the Seventh Circuit specifically addressed the invalidity of a release executed after arrest but before a determination of guilt or innocence by criminal trial. Judge Cummings, writing for a unanimous court, held that the "pre-conviction" release was void *ab initio* as against public policy. *Id.* at 88. Similarly, in *Dixon* v. *District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968), the Circuit Court addressed a "tacit agreement" to release civil rights claims in exchange for *nolle prosse* of criminal charges prior to criminal trial. Chief Justice Bazelon struck down the arrangement and declared:

> The major evil of these agreements is not that charges are sometimes dropped against people who probably should be prosecuted. *Much more important, these agreements suppress complaints against police conduct which should be thororoughly aired in a free society.* And they tempt the prosecutor to trump-up charges for use in bargaining for suppression of the complaint. *Id.* at 969 (emphasis added).

The decision below also is fully in accord with the only reported District Court decision concerning the same legal and factual issues presented in the case at bar. In *Horne* v. *Pane*, 514 F.Supp. 551 (S.D.N.Y. 1981), the Court addressed a

release executed after arrest but prior to conviction. The court declared the release invalid as a matter of law and stated:

> It seems to us beyond question that a criminal defendant forced to choose between being prosecuted on criminal charges on the one hand, and not being prosecuted but giving up certain constitutionally guaranteed civil rights on the other, cannot as a matter of law make an uncoerced choice. *Id.* at 552.

Thus, the decision below is in full accord with the three federal court decisions which have squarely addressed the invalidity of releases extracted after arrest, but while criminal charges were still pending.

The Circuit decision below declined Petitioners' invitation to apply "post-conviction" case holdings to the "pre-conviction" situation involved in the instant case. *Rumery* v. *Town of Newton*, 778 F.2d 66, 69 (1st Cir. 1985). Petitioners' attempt to create a conflict among the Circuits for the purpose of their Petition, where no such conflict exists, is without merit.

III. There Is No Important, Pressing Question of Federal Law.

The issue in the present case is narrow and unique to its facts and no amount of rhetoric can create it into one warranting review on certiorari.

The release/dismissal practice in a "pre-conviction" context is a very limited practice employed by police and prosecutors. This fact is evidenced by the dearth of cases on the issue: two Circuit decisions and one District decision. Even taking the "post-conviction" release/dismissal practice into consideration, it is apparent that police and prosecutor's efforts to obtain such releases is not widespread. The present issue is not a pressing one, crying out for consideration, at least not at this time, which would warrant this Court's review.

There is no merit to Petitioners' contention that the Circuit decision below raises an important question of federal law. Petitioners read the decision below too broadly. Petitioners erroneously believe that the Circuit decision below applies to both pre-conviction and post-conviction situations. Such is not the case.

Petitioners assert that the decision below "places an unwarranted constraint on prosecutors" and "too narrowly defines the public interest". On the contrary, the Circuit decision below recognizes "the latitude which prosecutors *necessarily must have* in determining whether to prosecute criminal charges". *Rumery* v. *Town of Newton*, 778 F.2d 66, 70 (1st Cir. 1985) (emphasis added). What the Court says, however, is that a prosecutor must determine whether to *nolle prosse* with only the public interest in mind. The Circuit decision below does not constrict a prosecutor's discretion so long as his/her discretion is restricted to public interests and does not include private interests. If a prosecutor determines that criminal charges should be dismissed, then the prosecutor's plain duty is to dismiss the charges without stipulations or private benefits. "No authority permits a prosecutor to consider personal or private advantages that might accrue to himself or to third parties from the exercise of his power". *Hoines* v. *Barney's Club, Inc.*, 620 P.2d 628, 635 (Cal. 1980) (Tobriner, J., dissent). Permitting a prosecutor to consider a third party's interest not only undermines the legitimate objectives of a prosecutor's discretion, but also injures the public interest.

Moreover, no legitimate public objective is advanced by a prosecutor obtaining a covenant not to sue other public officials in exchange for an arrangement to *nolle prosse* criminal charges. As the Ciruit Court below recognized:

> A release of a civil rights claim might arguably be given effect where the prosecution acts reasonably and has a fairly good case against the claimant. But in such a case, a

> good defense to a civil rights claim will exist and the need for a release will not come into play. Thus, the exception to the general rule of invalidity (of such releases) has the anomalous character of not applying where the police may desire it, and applying where they do not need it. *Rumery* v. *Town of Newton*, 778 F.2d 66, 70 (1st Cir. 1985).

IV. The Decision Below Is Correct and Reasonable.

In addition to correctly applying legitimate public policy considerations to a "pre-conviction release/dismissal arrangement," the decision below recognized "administrative problems" such releases would present if Petitioners' *ad hoc* balancing approach were adopted. *Rumery* v. *Town of Newton*, 778 F.2d 66, 70 (1st Cir. 1985). Such an approach would not only promote, but would encourage, police and prosecutors routinely to obtain such releases. These practices would require extensive investigations into whether the release/dismissal arrangements were made knowingly, willingly and freely in a non-coercive environment. *Id.* at 70.

Conclusion

It is respectfully submitted that Petitioners have failed to sustain their burden of establishing that there are special and important reasons why a Writ of Certiorari should be granted. The decision below did not decide a federal question in conflict with applicable decisions of this Court or of any other Court of Appeals on the same matter; nor does the decision below involve an important question of federal law which needs to be settled by this Court. The Court of Appeals for the First Circuit correctly held that the covenant not to sue public officials for alleged violations of constitutional rights, negotiated in exchange for a decision not to prosecute on criminal charges, is void as against public policy.

Respectfully submitted,

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